

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 UNITED STATES OF AMERICA,

4 Case No. 2:17-cr-00025-HDM-VCF

5 v. Plaintiff,

6 ANTHONY BARKLEY,

7 Defendant.

8 ORDER

9 Defendant Anthony Barkley has filed a motion for
10 compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). (ECF
11 No. 123). The government has opposed (ECF No. 125), and Barkley
12 has replied (ECF No. 127).

13 Barkley is currently serving an eight-month term of
14 imprisonment following a violation of two conditions of his
15 supervised release: the condition prohibiting contact with Tashoya
16 Epps, and the condition against drinking to excess. Having served
17 about half of this sentence, he now seeks immediate release from
18 confinement pursuant to the provisions of 18 U.S.C. §
19 3582(c)(1)(A).

20 **I. Standard**

21 18 U.S.C. § 3582(c)(1)(A) provides in relevant part:

22 [T]he court, . . . upon motion of the defendant after
23 the defendant has fully exhausted all administrative
24 rights to appeal a failure of the Bureau of Prisons to
25 bring a motion on the defendant's behalf or the lapse of
26 30 days from the receipt of such a request by the warden
27 of the defendant's facility, whichever is earlier, may
reduce the term of imprisonment (and may impose a term
of probation or supervised release with or without
conditions that does not exceed the unserved portion of
the original term of imprisonment), after considering
the factors set forth in section 3553(a) to the extent
that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction;

• • •

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.¹

U.S.S.G. § 1B1.13 provides:

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that-

(1)(A) extraordinary and compelling reasons warrant the reduction;

• • •

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(q); and

(3) the reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13.

The application notes to § 1B1.13 set forth specific examples of "extraordinary and compelling reasons," including "(i) [t]he death or incapacitation of the caregiver of the defendant's minor child or minor children"; or "(ii) [t]he incapacitation of the defendant's spouse or registered partner when the defendant would

¹ In addition to "extraordinary and compelling reasons," the court may grant a motion if "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)." 18 U.S.C. § 3582(c)(1)(A)(ii). Because Barkley is not more than 70 years of age and has not served more than thirty years in prison, this provision does not apply.

1 be the only available caregiver for the spouse or registered
 2 partner." *Id.* § 1B1.13 app. n.(1)(C). In addition, a catch-all
 3 provision provides: "As determined by the Director of the Bureau
 4 of Prisons, there exists in the defendant's case an extraordinary
 5 and compelling reason other than, or in combination with, the
 6 reasons described in subdivisions (A) through (C)." *Id.* app.
 7 n.(1)(D).

8 While several circuit courts have recently concluded that §
 9 1B1.13 does not apply at all to motions brought directly by the
 10 defendant, *United States v. McCoy*, -- F.3d --, 2020 WL 7050097, at
 11 *6-7 (4th Cir. Dec. 2, 2020); *United States v. Jones*, -- F.3d --,
 12 2020 WL 6817488, at *8-9 (6th Cir. Nov. 20, 2020); *United States*
 13 *v. Gunn*, -- F.3d --, 2020 WL 6813995, at *2 (7th Cir. Nov. 20,
 14 2020); *United States v. Brooker*, 976 F.3d 228, 234-36 (2d Cir.
 15 2020), the Ninth Circuit has not yet addressed the issue and, in
 16 its unpublished decisions, continues to cite § 1B1.13 as relevant
 17 authority in this context. See, e.g., *United States v. Dvorak*,
 18 2020 WL 7230602, at *1 (9th Cir. Dec. 8, 2020) (unpublished
 19 disposition). Other circuit courts also continue to identify §
 20 1B1.13 as the applicable policy statement. See *United States v.*
 21 *Monaco*, 2020 WL 6194688, at *3 (11th Cir. Oct. 22, 2020)
 22 (unpublished disposition); *United States v. Bell*, 823 Fed. App'x
 23 283, 284 (5th Cir. 2020) (unpublished disposition).

24 Absent contrary binding authority, the court concludes that,
 25 to the extent it is applicable, § 1B1.13 is the relevant policy
 26 statement for considering § 3582(c)(1)(A) motions brought by the
 27 defendant. Further, the court agrees with the well-reasoned
 28 opinions of several other courts that although the catch-all

provision by its terms applies only where the warden has found extraordinary and compelling reasons, the court is free to determine for itself whether extraordinary and compelling reasons exist -- with or without the warden's blessing. See *United States v. Etzel*, 2020 WL 2096423, at *3 (D. Or. May 1, 2020); *United States v. Haynes*, 2020 WL 1941478, at *14 (E.D.N.Y. Apr. 22, 2020) (collecting cases); *United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("Application Note 1(D)'s prefatory language, which requires a [catch-all] determination by the BOP Director, is, in substance, part and parcel of the eliminated requirement that relief must be sought by the BOP Director in the first instance.... [R]estricting the Court to those reasons set forth in § 1B1.13 cmt. n.1(A)-(C) would effectively preserve to a large extent the BOP's role as exclusive gatekeeper, which the First Step Act substantially eliminated.").

The defendant is not entitled to be present for a hearing on a motion for compassionate release. See Fed. R. Crim. P. 43(b)(4).

II. Analysis

Barkley asserts extraordinary and compelling reasons support his early release: the need to take care of his three minor children who cannot or will not be cared for by their mothers. The government opposes, arguing that Barkley has not established extraordinary and compelling reasons for his early release and that he remains a danger to the community.

A. Exhaustion

Before a defendant may file a § 3582(c)(1)(A) motion, he must either (1) exhaust any administrative appeals of the warden's refusal to bring a motion or (2) wait thirty days from the warden's

1 receipt of the request, whichever is earlier. Given that Barkley
2 has not yet been designated to a BOP institution, the government
3 waives the exhaustion requirement in this case.

4 **B. Extraordinary and Compelling Reasons**

5 In his motion, Barkley asserts that the mothers of his three
6 minor children cannot care for them and so, while he is
7 incarcerated, they are being cared for by Barkley's mother and
8 aunt. Barkley's mother lives in Sacramento, California, and has
9 only been staying in Las Vegas since Barkley's arrest to take care
10 of Barkley's oldest child, who is a senior in high school.
11 Barkley's aunt has been taking care of Barkley's two younger
12 children, who are 3 and 10. Barkley's aunt asserts that taking
13 care of the two young children has become a hardship because she
14 cannot seek work while doing so. And due to work commitments,
15 Barkley's mother must soon return to Sacramento, which would force
16 his eldest child to move out-of-state during his last year of high
17 school. Barkley asserts that his situation presents extraordinary
18 and compelling reasons to grant his immediate release in order to
19 take care of his children.

20 The government has opposed, arguing that Barkley's assertions
21 of hardship are unsubstantiated and that Barkley's situation is
22 typical when one parent is incarcerated and thus do not constitute
23 extraordinary and compelling reasons for his early release.

24 The facts as alleged by Barkley do not amount to extraordinary
25 and compelling reasons for shortening his already short sentence.
26 First, as the government points out, these arguments were not
27 raised by Barkley at his revocation sentencing hearing, which took
28 place just one month before he filed his motion. The court will

1 not speculate as to why Barkley's attorney did not raise these
2 issues, but Barkley could have done so himself during allocution.
3 More importantly, however, the caregivers for Barkley's children
4 have not died or become incapacitated, and Barkley's children are
5 being taken care of. While the court is cognizant of the challenges
6 of that situation, it does not justify Barkley's release at this
7 time. Finally, while this is not a determinative factor in the
8 court's decision, nothing in the record supports Barkley's
9 assertion that the mother of his two younger children, Tashoya
10 Epps, cannot take care of her children. Epp's two declarations
11 state that Barkley has custody of the children and is their sole
12 provider, and that the battery allegations she had previously
13 lodged against Barkley were not true, but nowhere do they state
14 that she cannot care for the children even part-time while Barkley
15 is incarcerated, which could allow Barkley's aunt to seek work.
16 The motion for compassionate release will therefore be denied.

17 Having so decided, it is unnecessary for the court to address
18 the government's assertion that Barkley remains a danger to the
19 community.

20 **III. Conclusion**

21 In accordance with the foregoing, Barkley's motion for
22 compassionate release (ECF No. 123) is hereby DENIED.

23 IT IS SO ORDERED.

24 DATED: This 1st day of February, 2021.

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27 UNITED STATES DISTRICT JUDGE
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